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Utah Supreme Court

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Jackson Howard; Howard, Lewis & Petersen; Attorneys for Respondents.

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IN THE SUPREME COURT
OF THE STATE OF UTAH

BRIGHAM YOUNG UNIVERSITY
J. Reuben Clark Law School

J. R. BAGNALL, aka	:	
JOSEPH R. BAGNALL,)	
and FLORENCE BAGNALL,	:	
)	
Plaintiffs and	:	
Respondents,)	
	:	
vs.)	Case No.
	:	13,753
SUBURBIA LAND COM-)	
PANY, an Idaho cor-	:	
poration, et al.,)	
	:	
Defendants)	
and Counter	:	
Appellants,)	

BRIEF OF PLAINTIFFS AND RESPONDENTS

APPEAL FROM JUDGMENT OF THE SIXTH JUDICIAL
DISTRICT COURT OF SANPETE COUNTY, STATE OF
UTAH, HONORABLE MAURICE HARDING, JUDGE

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Counter Respondents

FILED

JUN 3 - 1975

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IN THE SUPREME COURT
OF THE STATE OF UTAH

J. R. BAGNALL, aka JOSEPH R.	:	
BAGNALL, and FLORENCE BAGNALL,)	
	:	
Plaintiffs and)	
Respondents,	:	
)	
vs.	:	Case No. 13,753
)	
SUBURBIA LAND COMPANY, an	:	
Idaho corporation, et al.,)	
	:	
Defendants and)	
Counter Appellants.	:	

BRIEF OF PLAINTIFFS AND RESPONDENTS

NATURE OF THE CASE

The case involves a breach of contract, repossession, and other remedies to the seller as provided by contract.

DISPOSITION IN THE LOWER COURT

The Court, sitting with an advisory jury, found the issues in favor of the plaintiffs and against the defendants. It further denied the defendants' motion for judgment on the verdict, or, in the alternative, for a new trial, and granted judgment in favor of the plaintiffs, and against the defendants forfeiting the real estate agreement and quieting title in the plaintiffs, except for an undivided 1/2 interest in 140.15 acres, which the court, by summary judgment and decree of quiet title, awarded to United Paint and Colors. Plaintiffs' appeal from that order is also pending before this honorable Court.

RELIEF SOUGHT ON APPEAL

The respondents seek affirmation of the judgment and decree of the trial court.

EDITORIAL NOTE

The respondents find it difficult to write a statement of facts in response to the distorted version of "facts" submitted by appellants. This difficulty exists because the appellants have failed to designate a sufficient portion of the record to enable the Supreme Court to intelligently evaluate the claims of both parties. The respondents have made an appropriate motion to dismiss the appellants' appeal, which motion is pending at the filing of this brief.

The motion to dismiss is made because the appellants failed to designate the entire record pertaining to the issues on appeal to this court, but rather designated only a partial transcript which consisted of the following: (1) all the cross-examination of J. R. Bagnall, (2) the direct examination of Lester Romero, (3) cross-examination of Florence Bagnall, (4) direct examination of Reed R. Maxfield, (5) testimony of Lynn Nielsen, and (6) direct examination of Bruce Watkins and Jackson Wanlass. Appellants failed to bring up the record consisting of the missing portions in regards to the above witnesses, and also the entire testimony of Judge Don V. Tibbs, Mildred S. Maxfield, LaVera Maxfield, Leland Peterson and John Brown.

Because the respondents were concerned about the status of the transcript, they moved the court to compel the appellants to designate the entire record. Upon argument before the Utah Supreme Court, appellants' counsel stated to the court that the record designated would sufficiently cover the disputed areas. The court, therefore, acquiesced in the appellants' assertion that the record was adequate to cover the appeal.

It was not until the appellant brief was received that respondents discovered the record designated by appellants omits all contradictory and rebuttal evidence and testimony offered by plaintiffs-respondents. For these reasons, therefore, when referring to the record, respondents will be unable to designate the exact page of the record in support, but will merely state the record area in the following manner, e.g.:

J. R. Bagnall - Direct, Cross (as the case may be).

Florence Bagnall - Direct, Cross (as the case may be).

The appellant brief also fails to disclose that appellants are Suburbia Land Company of Idaho, Suburbia Land Company of Nevada, Suburbia Land Company of Utah, and Lester Romero.

Prior to appellants' assertion to this Court that its record on appeal was adequate, respondents had a portion of the balance of the record designated. Therefore, there is a partial transcript of additional testimony on file with the court. That partial transcript covers the following testimony: J. R. Bagnall, re-direct; Lester Romer, cross and re-direct; Florence Bagnall, direct and re-direct; Bruce Watkins, cross, re-direct, re-cross, and re-direct; Reed Maxfield, a very small portion of cross-examination.

STATEMENT OF FACTS

The statement of facts of the appellants is more argument than fact. It is astounding and shocking to the respondents that the appellants, in this instance, contend that there is a similarity between the statement of facts as contained in the brief and that which is contained in the record. The truth is that there is but a fleeting similarity. The appellants have

failed to set forth that portion of the record which refutes and contradicts their version of the facts. They further have only stated, without the benefit of the record, the facts most favorable to them, without giving credence to the right of the court and the jury to believe the substantial, persuasive, and in this case, overwhelming accumulation of evidence to the contrary.

Recognizing that a statement of facts should not be used to argue the point, we apologize in advance for the necessity of argument in response to argument, and beg the court's indulgence in our criticisms of the appellants brief.

Mr. and Mrs. Bagnall are past 65 years of age. Mr. Bagnall holds a Masters Degree in education and Mrs. Bagnall is an accomplished writer. Both are gentle people, as indicated by their history. Mr. Bagnall was a former superintendant of schools of the North Sanpete County School District and has engaged in educational pursuits all his adult life. In addition, he has engaged in farming since he was a small boy and grew up on the property which was sold to the appellants and which he personally operated until 1952. (J. R. Bagnall - Direct, Florence Bagnall - Direct)

The property had been sold under a real estate contract in 1952 to the respondents' relatives, one of whom was Mrs. Nyberg, Mr. Bagnall's sister by adoption. An action was commenced by the Bagnalls in 1962 to repossess the property. That action was handled by the Bagnalls' attorney, Don V. Tibbs, now Judge of the Seventh Judicial District. While the action was pending, Reed R. Maxfield made his appearance on the scene at Mr. Tibbs' office.

To paraphrase Mr. Tibbs' testimony, Maxfield appeared in

Tibbs' office saying that he had purchased all the outstanding interest of the buyers under the 1952 contract (Tr. 3, 23, 24, 27, 30, 31) and that he was prepared to make payment of the delinquency then owing under the contract. He indicated he was living on the ranch. (Tr. 320) Within a day or two of that occasion, the Bagnalls had come home from California for a short vacation and, by coincidence, while they were there, Maxfield again showed up in Tibbs' office with his attorney, Mr. Robert Hughes, with a suitcase full of greenbacks. He made payment of the delinquency in this case in small demonination bills. (Tr. 21, 22, 188) (J. R. Bagnall - Direct; Florence Bagnall - Direct; Don V. Tibbs - Direct, Cross)

One cannot readily appreciate Mr. Maxfield's demeanor and conduct without seeing him in court and without reading the description of the transaction given by Judge Tibbs. (Tr. 99)

Q. Could you tell us how you remember that occasion?

A. My recollection is that Mr. Maxfield came in some bib overalls, farm overalls, and they were big and, of course, I didn't know him and he sat down and I told him that he was going to have to have some money and he started to bring out, as I recall, tens and twenty dollar bills in sacks.

Q. Bringing them out of where?

A. Oh, every place that you could imagine, out of those overalls and I didn't think that there was that much money that came in overalls, if I may put it that way.

As an adjunct to this description, Maxfield testified on cross-examination that the money came from his transactions with the Uintah Finance Company, a company of which he was president and that had become insolvent, and that he preferred to take his

interest in business transactions in cash, that he did not believe in bank accounts, checking books, or record keeping. (Maxfield - Cross) These facts are not contained in the appellants' record.

In any event, the modification agreement was prepared by Mr. Tibbs, who had relied upon the representations of Messrs. Maxfield and Hughes that Maxfield had acquired the outstanding interest of Mrs. Nyberg, the outstanding interest of all the other parties to the 1952 contract; that all he wanted was a deed put in escrow and that he would take care of the rest of the problems. He further stated he was prepared to sue the Bagnalls to enforce his rights. He further advised Mr. Tibbs that he was president of Suburbia Land Company, an Idaho corporation, and that he wanted the agreement and deed made in favor of that corporation. (J. R. Bagnall - Direct; Florence Bagnall - Direct; Don V. Tibbs - Direct and Cross)

Mr. Maxfield made his statements in unequivocal, dogmatic terms, more in the form of an ultimatum. After conversing with their attorney, Mr. and Mrs. Bagnall concluded that they were willing to go forward with the contract if the payments were made, even though they had some concern about Mr. Maxfield because of the bizarre nature of his appearance, demeanor, and threat; and, of course, the unusual manner of payment. (Bagnalls - Direct; Don V. Tibbs - Direct and Cross)

From 1962 to the time of trial, Maxfield was never again current. The record of payment is set forth in Exhibit 9, a copy of which exhibit is set out herein. (Bagnalls - Direct; Anderson - Direct and Cross)

By July of 1969, the buyers had failed to make \$15,502.23 in payments on the contract as evidenced by Exhibit "37", and had

failed to pay the taxes and water assessments in the amount of \$ as shown on Exhibit 9. (Note: This exhibit has been misplaced by the court or counsel for the appellants. When the exhibit is found, the dollar amount will be inserted.)

Maxfield had come to the Bagnalls with complicated and fictional stories of "title problems" he was encountering, none of which had any basis in fact. In any event, in the summer of 1969 the Bagnalls concluded that they had to take the property back. The property was in a sad physical condition. (Tr. 37,38) The indebtedness was increasing and their security had been diminished. They, therefore, employed a California law firm to commence the action. The history of the action is contained in the record. To make a long story short, the ultimate litigation culminated in this lawsuit in Sanpete County. (Bagnalls - Direct; Tibbs - Direct and Cross)

By various legal manipulations, the defendants-appellants were able to keep the lawsuit in a pre-trial status for more than four years. During that period of time, the respondents were continually frustrated by the appellants' refusal to comply with discovery, by their convenient loss of documents, by threats of injury to person and property, and other dishonorable conduct on the part of the appellants. (Bagnalls - Direct)

The appellants have failed to tell the court that Suburbia Land Company, an Idaho corporation, was incorporated January 17, 1961, and had its charter forfeited by the State of Idaho on November 30, 1961, and at the time of entering into this contract it had no legal standing in the State of Idaho or in any other state. (Exhibit 38) The evidence appears to be that the initial

officers and directors were a Mr. Rodriguez, a Mr. French, and a Mrs. Rodriguez. Mrs. Rodriguez was apparently a secretary in the law office of Robert Hughes. There are no other records for the corporation, because the minute books and other documents have been conveniently lost. In July of 1962, Reed Maxfield signed as president of the company, but it now appears that in 1962 the company did not have other officers, directors, capital, or status in any state. (Maxfield - Cross; Romero - Cross; Pretrial Order)

The court will note that the defendants claim that the rights of Suburbia of Idaho, Inc. were transferred to Suburbia Land Company, a Nevada corporation, which was incorporated on October 8, 1962. This corporation had its charter forfeited in March of 1964. (Tr. 24) The original directors of the Nevada corporation were a Mr. Roy Barrett, a Mr. Robert Hughes, and a Mrs. Sylvia Rodriguez. There is no evidence that there was a change in the directors of the corporation; however, Reed Maxfield, without the benefit of evidentiary support in his deposition and at the trial, claimed to be the president of the Nevada corporation, but he did not know any of the details of its existence or demise. There were no records for the Nevada corporation. (Tr. 183) (Maxfield - Cross; Romero - Cross, Exhibit 39)

In respect to the qualification of the Nevada corporation in Utah for the purpose of doing business, the Nevada corporation filed a qualification statement in November of 1962; however, it attached to its Utah application different articles than those which it had filed in the State of Nevada, and the articles filed

with the Secretary of State of the State of Utah were not signed or notarized and were not authenticated. The certificate to do business in the State of Utah, even though improperly issued in the first place, was revoked on March 9, 1964, for failure to comply with the law. (Maxfield - Cross; Romero - Cross; Exhibits 40 and 41)

On August 27, 1960, the Utah corporation changed its service agent and filed a domestic information statement showing Lester Romero, president; Maxine Romero, vice-president; and Leland Peterson, secretary-treasurer. This corporation had its charter suspended on September 15, 1970, for failure to pay taxes. (Maxfield - Cross; Romero - Cross; Exhibits 42, 43 and 44)

The defendant, Reed Maxfield, then incorporated Suburbia Land Company, a Utah corporation, on April 2, 1968. The directors of this corporation were Reed Maxfield, Lyndon Maxfield, his brother, and DeVerl Simmons, Mr. Maxfield's hired man at the ranch in Chester. At this time, more than four years had transpired during which period there was not any corporation by the name of Suburbia Land Company with any authority to do business anywhere.

During the course of the trial it developed that Leland Peterson had never been secretary-treasurer of the Utah corporation. He was called as a witness for the respondents and testified that he knew nothing about Suburbia Land Company of Utah and claimed he had never been an officer or director and had never attended any stockholders meetings. The entire testimony of Lester Romero and Reed Maxfield in respect to this corporation was disputed and contradicted and the document filed with the Secretary of State concerning Peterson was perjurious and the testimony of Maxfield

and Romero in court concerning Peterson was unbelieved and perjurious. It is this corporation that appellants claim to have made the tender referred by the appellant on August 28, 1970. (Maxfield - Cross; Romero - Cross; Peterson - Direct and Cross)

Mr. Romero contends that he has always been president of Suburbia Land Company, the Utah corporation, even though the testimony of Mr. Romero and Mr. Maxfield in this regard is diametrically opposed. (Maxfield - Cross; Romero - Cross)

None of the above-stated facts are reflected in the record designated by the appellants, but all were material, germane and persuasive in the court's decision and in the jury's decision. Other facts not reported by the appellants nor designated in the record will be further stated. For example, on the date of the modification agreement, July 15, 1962, the balance owing on the contract was \$54,142.15. (Exhibit 9, Bagnalls - Direct, Tr. 89) While on the date of trial, April 22, 1974, the balance owing, exclusive of taxes, interest and assessments, was \$63,298.64 (Exhibit 12) and there were delinquent taxes, interest, and assessments payable of \$5,880.46. (Exhibit 9, Bagnalls - Direct) In other words, during the time in which the appellants were in possession, and even though the contract was only a five percent contract, the outstanding balance increased by more than \$14,000. Not only that, but the appellants also failed to tell the court that during the time they were in possession they failed to maintain the property with even minimal standards of husbandry. They allowed the fences to deteriorate and become broken; failed to maintain the buildings and wasted and depreciated the assets and security of respondents. (Tr. 37, 38, Bagnalls - Direct) None of

these facts are recited in the partial record designated by appellants.

It would be impossible, within fifty pages, to correct all the errors in appellants' statement of facts; however, particularizing the portions that seem most material, starting with page 3, the following recited "fact" by the appellants requires comment:

At the time the modification agreement was signed on July 15, 1962, Reed R. Maxfield represented he was the president of Suburbia Land Company and that Suburbia Land Company had acquired all of the outstanding interests of all other parties to the property. (Tr. 23, 24, 27) The appellees and their attorney at that time, Don V. Tibbs, relied upon the representations of Mr. Maxfield and, therefore, made a deed which was placed in escrow to all of the property on the theory that the representations made by Maxfield were true. The fact is that they were true, but that Maxfield, for devious, duplicitious and unscrupulous purposes, had deleted one-half of the 140 acres acquired from Mrs. Nyberg and left it in Utah Valley Land and Development Corporation, a corporation in which he had an influential interest, if not control, and which corporation conveyed the same property to United Paint and Colors Company on March 26, 1974. United Paint and Colors Company is a corporation owned by Mr. Maxfield's parents and brother. The respondents have always paid the taxes on this property, even during the delinquency of the appellants. (Bagnalls - Direct, Exhibit 9)

The entire transaction between the appellants and respondents was bizarre. The respondents never knew with whom they were dealing. Maxfield had an elusive and transient air about him and he

dealt with corporations that came and went like the wind. Furthermore, he never kept any business records. He made what payments he made in cash. He contends, for example, concerning his alleged July, 1969, tender, that he had some \$140,000 in cash kept in a duffle bag in the closet of his house. (Maxfield - Cross; Mrs. Maxfield - Cross) The testimony of Mrs. Maxfield was so totally incredible that the court and jury rightfully concluded that the Maxfields were never able and willing to make tenders. During the period that Maxfield claimed to have over \$100,000 in cash in his closet he was attempting to borrow against the property at the Bank of Ephraim. (Tr. 300) The jury found, as did the court, that none of the tender offers were made in good faith and at no time did any of the parties, Suburbia, Maxfield, or Romero, have money by which they could make payment. (Finding of Fact 15)

Getting back to appellants' brief, a great amount of space was used showing that plaintiffs-respondents were to render a title opinion as soon as possible. The fact of the matter is that Mr. Tibbs testified, as did Bagnalls, that they were not to render a title opinion at all, but rather that they were to get the abstract prepared, deliver it to the buyer, and the buyer was to have an opportunity to obtain a title opinion if he so desired. Judge Tibbs testified concerning the custom in Sanpete County and the court instructed the jury that he took judicial notice that the ordinary custom in the profession was that the buyer secured a title opinion for the property. (Record of Court; Finding of Fact 19; Special Verdict 9)

In respect to the abstract of title, notwithstanding the repeated claim that the respondents had not furnished the abstract,

the record clearly showed, and Mr. Tibbs testified, that he called Mr. Maxfield repeatedly and asked him to pick up the abstract for the purpose of reading it and Maxfield never attempted, prior to the trial date, to acquire the abstract for the purpose of checking the title. (Tibbs, Bagnalls - Direct)

One other contention that is totally without foundation is that the one-half interest in the 140 acres is in the central part of the ranch. It is in one of the lesser parts of the land, being meadowland that has been badly treated, is poorly situated, and presently is a bog. The contention that the appellants concerning the one-half interest in the 140 acres, that the sellers were to furnish a title opinion is just contrary to fact and contrary to evidence and is without record support in the appellants' brief.

There was, in fact, no defect in the title of the respondents. The appellants made no genuine claim that there was a defect of title prior to the commencement of this action. Admittedly, Maxfield prepared some deeds which he took to the respondents, contending that there were some outstanding interests, but upon searching the title it was obvious and clear that he had manufactured a title flaw where none existed. He obtained deeds from a Mr. Powell, but Powell had no conflicting claim. The implication that there was a flaw in the title is false. (Tr. 79, Bagnalls - Direct; Maxfield - Cross) The Phillips Oil Company had checked the title to the property, considered that the title to the property was clear and took a lease to the Bagnall property on the basis that the title was clear. (Tr. 77) Further, the Bagnalls had, by contract, retained the interest that they leased to Phil-

lips. (Bagnall - Direct)

In respect to the statements made by the appellants concerning the abstracts, the title opinion and the interest of Nyberg on page 5 of their brief, it would suffice to say that the evidence was totally controverted by Mr. Tibbs and the Bagnalls, and the testimony of Maxfield was just unbelievable, and the record of the trial would so demonstrate were it before the court.

(Tibbs, Bagnalls - Direct)

In respect to the water stock referred to on page 6 of the brief, by inadvertance one certificate covering six shares of stock were, in fact, not put in the escrow agreement. See also letter, Exhibit 23. The appellants had never made a demand for the said stock and the water represented by the stock was being used by the appellants. The respondents at all times during the course of the contract had substantially complied with the contract and the failure to put the stock in the escrow agreement was not a material breach of contract that would justify nonpayment of installments due under the purchase price. When the respondents learned of the error, they corrected it and the stock was put into escrow. The record, were it brought before the court, would so demonstrate and, therefore, the contentions set forth in appellants' brief are without foundation and fail to show the contrary and rebutting testimony offered by respondents. (Bagnalls - Direct; Tibbs - Anderson)

Concerning an alleged title flaw because there exists a county road and railroad track on the property which was not disclosed in the abstract, one merely states that the buyer cannot claim a title defect against facts and circumstances which were obvious to any buyer. The railroad track has been on the pro-

perty since 1896 and the county road had been on the property since the memory of man runneth not to the contrary. In fact, Maxfield had to drive down the county road to get to the ranch house in which he was living when he entered into the agreement of July, 1962. It must have been obvious to him that it was a county road and that it took a portion of the ranch from the acreage contained in the abstract, which was primarily described by sections and quarter-sections. To contend that this was a title flaw is to insult the intelligence of the court. Furthermore, the appellants have failed to bring up the record concerning the admission of this fact and the court's comment on it, whereas were it before the court, in record form, it would be obvious that the trial court judge properly disposed of that matter. (Finding of Fact 23)

Counsel stated that on page 7 of the brief that Reed R. Maxfield, then president of Suburbia Land Company of Utah, knew that the plaintiff could not comply with the agreement. This runs contrary to the testimony of Lester Romero, who contends that he was president of Suburbia from April of 1968. It was on the basis of Romero's testimony that Maxfield was dismissed as a party to the action because he could not have been an officer, director, or alter ego of Suburbia by reason of his testimony and that of Romero's. On the basis of his representations to the court, he was released from the case, and yet he has the audacity to state on page 7 of his brief and represent to this court that he was president of the company. There is very little truth in the representations of the appellants reflected on page 7 of the brief, and, therefore, these respondents can find no nice way in which to say that they disagree with the representations. Such assertions con-

cerning the alleged rejection of the tender were totally refuted by the Bagnalls and Tibbs and are unsupported by evidentiary record.

The assertion by the appellants that tenders made by Maxfield, Romero, or Suburbia were in good faith is erroneous for a multitude of reasons, none of which are reflected in the record brought before this court; however, the substance of the reasons was that Maxfield was so elusive in respect to the corporations (Suburbia) or the persons for whom he was allegedly making a tender and was so elusive in respect to what he was tendering that it was apparent from the proof that was presented that neither Maxfield nor Romero had means of making a bona fide tender during any of the period of time which any of them were in possession. The court found that the alleged tenders were all in bad faith because the exact amount owing on the contract was easily determined from the records of the Bank of Ephraim (Tr. 17, 34, 37, 95, 131, 133, 5) or for that matter, from the records of Suburbia, Maxfield or Romero, had they made an effort to put their pencils to the calculations. The tenders, as made, were simply a subterfuge. Furthermore, the representation to the court that a tender was made by Suburbia Land Company, a Utah corporation, in September of 1970, when that very month the corporation's charter was revoked for failure to pay franchise taxes is somewhat inconsistent with the contention that it had money to make payment.

Mr. Romero's performance on cross-examination concerning his relationship with Suburbia of Utah would tax the credulity of a child. He did not know anything about the corporation, its conception, its operation, where its records were, what bank accounts it had, the fact that its charter had been revoked, etc. (Romero - Cross) It was proved conclusively by the respondents from the

belated admissions of Maxfield (Tr. 15, 16, 67) and Romero that none of the corporations, at any time, paid taxes to the State or Federal governments, nor did they, in fact, file tax returns (Tr. 67) notwithstanding the fact that appellants were operating the ranch and selling grain, produce, and cattle and had leased a part of it for which they had rental income. Nothing was reported to the government. (Tr. 67; Stipulation into the record)

The trial court, contrary to the representations of the appellants, ruled categorically into the record during the trial that none of the tenders made by the appellants were valid. (Finding of Fact 18; Record not furnished)

In respect to the \$400.00 payment that was received by the Bank of Ephraim, that sum was received by the bank by virtue of an order of the court that it be conditionally held in a separate account by the bank until the disposition of this case. Neither the bank nor respondents accepted the money. (Bagnalls; Maxfield - Cross; Anderson; files and pleadings) Appellants did not see fit to redeem that \$400.00 and now contend that it constituted a payment which was accepted, and, therefore, constituted a waiver. This statement of fact is blatantly contrary to truth, to testimony, and to the record, had the record been brought before this court.

When the appellants state that they have sustained much pain and suffering in this case, (see page 9 of their brief) the substance of the pain and suffering, just like the substance of the facts and truth in this case, lie with the respondents, not the appellants. It is particularly galling to the respondents to have an emotional appeal made on "facts" that are unsupported or refuted by other witnesses in the record and which, as presented,

could only constitute a fraud upon this court.

ARGUMENT

POINT I

RESPONDENTS WERE NEVER IN DEFAULT UNDER THE TERMS OF THE MODIFICATION AGREEMENT.

Contrary to the assertions of the appellants, the question of marketable title was never a point of issue since Maxfield represented to Mr. Tibbs and to the sellers that he had acquired all of the balance of the outstanding interest of the parties. (Tr. 3, 23, 24, 27, 30, 31) Relying on his own assertions, the modification agreement of July 15, 1962 was made. To blatantly state that there was an outstanding title in the name of Mrs. Nyberg acquired by Utah Land & Development Company and, subsequently acquired by Utah Paint and Colors Company, a Utah corporation, requires appellants to ignore the testimony of Mr. and Mrs. Bagnall and Mr. Tibbs. (Tr. 69, 72, 74, 79, 81, 119) It further requires this court to ignore what the trial court and the jury obviously believed, to-wit, that Maxfield controlled Utah Valley Land & Development Corporation and that Maxfield, in fact, had acquired the interest of Jane B. Nyberg and Utah Valley Land & Development Corporation and that such interest (United Paint & Colors Company) was conveyed out by Maxfield purposely in order to create a flaw in the title justifying his failure to make payment under the contract as required.

At no time did Maxfield advise Bagnalls of this alleged title flaw until the action was commenced and even then, it was not until October 20, 1971, that United Paint and Colors Company, a Utah corporation, acquired title to this outstanding interest.

That corporation is controlled by Maxfield's mother, father and

brother. The jury and the court found Maxfield's position untenable and properly concluded that if there were a flaw in the title, it was at the instance of Maxfield and the appellants. (Special Verdict 4, 13, 14, 15; Finding of Fact 23)

There is no adequate record before the court upon which the facts related herein can be completely documented; however, it must be sufficient to state that if the entire record had been brought up, the respondents could clearly sustain their position in the record.

The appellants seem to take comfort out of the preliminary conclusions of the court contained in the pretrial order (see Pretrial Order, pps. 6, 7) related to this alleged defect in the title. The court stated in open court when reviewing the matter and rendering its judgment that the pretrial order was made without sufficient information, and when there was contrary believable evidence before the court, the court was obligated to correct the pretrial finding and, therefore, the pretrial order could not stand opposed to the proof of fact. (see entire Findings of Fact; Decree; and Record) It would have been error for the court to have ruled otherwise than it did in Findings of Fact Nos. 14, 15, 16, 17, and 18.

In respect to the oil and gas lease of Phillips Petroleum Company, the plaintiffs-respondents had a perfect right to lease the oil, gas, and water rights to the property. (Bagnalls, Exhibits 34 and 35) The entire lease was contingent upon this litigation and Phillips was willing to assume the risk of the right of the respondents to lease, knowing full well the pending litigation and the claimed rights of Maxfield and his friends. (Bagnalls - Direct)

the buyer, they retained the fee right to 1/2 of the oil, gas and minerals. (Bagnalls - Direct; Exhibits 3, 35)

Whether the sellers were in default under the terms of the modification agreement of 1962 is a factual question. It is respondents' contention that there was sufficient evidence in the total record, if it were before the appellate court, to support such a finding. Respondents, therefore, cite no case authority because Point I is a factual issue which the court correctly decided and the record would so demonstrate if it were brought before this court in its entirety.

POINT II

THE APPELLANTS NEVER MADE A VALID OR TIMELY TENDER TO THE RESPONDENTS FOR THE DELINQUENCIES DUE UNDER THE CONTRACT.

This point is like the first point. The appellants assume there are no facts contrary to that which they assert. The fact is that the evidence of tender by appellants was so shallow and frivolous as to cause the court and jury to question the good faith of the appellants in making such an argument. It would seem apparent from the argument made by the appellants that his, its or their tender depending on who it happens to be at the time, was not made in good faith. Even though the exact amounts owing were within Maxfield's knowledge, (Tr. 5, 16, 17, 34, 95, 131, 132) he continually wrote letters offering to pay "any and all amounts due" to the sellers. The language in the tenders of Maxfield, Suburbia, Mrs. Maxfield and Romero are all identical and were all written on the same typewriter, obviously by Reed Maxfield. (Maxfield - Cross; Mrs. Maxfield - Cross) I

It was apparent that Maxfield was playing coy with the sellers for the respondents proved conclusively that none of the

parties, Suburbia, Maxfield or Romero, were able at any time to make payment of the delinquent amount owing to the sellers. The record is replete with evidence of financial inabilities such as the inability to pay income tax, the inability to pay franchise tax, the revocation of charters, the delinquency in water assessments, the delinquency in payment of property taxes, the unsuccessful attempts to borrow money, (Tr. 300) all during the period of time in which appellants contend they were making tenders. During this time, Bagnalls, in order to prevent tax sale of their property, were required to make the payment of taxes owing against the property and water. (Bagnalls - Direct; Tibbs; Exhibit 9) None of these facts are contained in the record brought up by appellants.

Appellants further fail to tell the court that when the plaintiffs attempted to accept the tenders the defendants offered them cemetery lots (Tr. 106, 165) in Las Vegas, Nevada, or coupon books for frozen foods in some food distribution program, (Tr. 165) but never money. The Bagnalls had no confidence in Maxfield (Tr. 38) after his repeated and persistent delinquencies. (Tr. 85) At no time from 1969 to 1974 did the defendants, in fact, offer the plaintiffs money to bring up the delinquencies. (Bagnalls - Direct; Maxfield - Cross) On the contrary, Mr. and Mrs. Bagnall testified that in July, 1969, they went to see Maxfield at the ranch. At this time they noted the deplorable condition of their ranch. (Tr. 37,38) They plead with Mr. Maxfield to bring the delinquencies up because they had payments of their own to meet. Mr. Maxfield, contrary to his assertion that he always had funds, explained to them that he was not going to pay them, that he didn't have any money, and that he had already mortgaged

the property and everything on it to other people. (Tr. 35, 36, 39, 165) He even produced a copy of the mortgage that he had made to LaVera Maxfield, his mother, which he had put on the entire property to cloud the title. (Exhibit 54) This he did even though he did not have a deed to the property. Furthermore, he told Bagnalls that he was skilled in this type of enterprise and that he would make the matter so complicated and so difficult that no lawyer could disentangle and clear the title. (Tr. 39) The substance of his statements to the respondents at that time was that there was nothing that could be done to collect the money from him, that it was his ranch, and that he was not going to pay them any money for it. This comment was made at the same time he contends he was making a tender. (J. R. Bagnall - Direct)

It was this particular tender which Maxfield said in court he could have made because he had \$140,000 in a duffle bag in his closet. The fact that Maxfield did not do business in an orthodox manner was sufficient to cause the jury to believe that he was not entirely a wholesome character. His willingness to prevaricate was sufficient to discredit his entire testimony before the jury. (Bagnalls - Direct; Maxfield - Cross)

During cross-examination he was caught in one lie after another. Maxfield, as a credible witness, was totally impugned. For example, Maxfield, after parading before the jury his vast experience as a corporate officer and director, admitted he did not know a corporation had to do such fundamental things as maintain its charter in good standing. (Tr. 79) It is impossible for the respondents to recite the facts as to Maxfield's credibility because the complete record is not before the court. The most that the respondents can do in this brief is to recite

the facts from memory.

Appellants extensively argue the pretrial order concerning the validity of the tender. The court, in its pretrial order, however, did not pass judgment on whether the tender was made in bad faith as that aspect was specifically reserved for trial.

(See Pretrial Order IV, 6) The appellants tend to ignore the special interrogatories served on the jury which, when read together, conclude that appellants' tenders were unperformable and made in bad faith. The court itself concluded that the tenders made were all in bad faith. (See Finding of Fact 18) It does not serve the appellants well to argue to this court, as fact, that which is contrary to the fact proven and for which there is substantial evidence.

This court has repeatedly said that the statement of facts and the argument must be on the basis of the facts as they may have been believed by the court and jury. On the basis of evidence presented, it is impossible for the respondents to understand how the court could have ruled otherwise than that the tenders were made in bad faith. Appellants engage in the gymnastics of citing the pretrial order to the effect that their tenders would be satisfactory if made in good faith and then totally ignore all evidence that they were made in bad faith.

It is not sufficient to cite the Utah statutes on a valid tender. Both parties are aware of these statutes. The tender statutes were argued at length and with briefs. The fact remains that the court and jury found, on a question of fact, that the tenders were made in bad faith by persons who were incapable of making tenders, by persons who were not privy to the contract, by persons who had no legal existence and status, and by persons who

did not have practical capability of performing the tenders. Since the facts are totally against the appellants on Point II, it seems futile for respondents to argue the law.

a The appellants belabor the court's Findings of Fact which are amply supported by the special verdict of the jury. It is fundamental that the appellants can not complain of a Finding of Fact which is supported by material and substantial evidence. The difficulty with the appellants' position is that they have failed to bring to this court the entire record, but rather have chosen to be selective in designating only certain portions of the transcript from which they would appeal.

Referring to page 33 of the appellants' brief concerning the testimony of Bruce Watkins, the appellants would have the court believe that there was a commitment by the Clearfield State Bank for \$15,000.00. On cross-examination, Mr. Watkins admitted that the most he had before the bank was an application of many months prior which had not been acted upon for a variety of reasons, (Tr. 30, 52) all the fault of Mr. Maxfield. Peculiarly the application was by Mr. Maxfield for property in Sanpete County. It was for a loan to him personally. He had never complied with all of the terms of the application, such as furnishing a financial statement. Mr. Watkins further testified that it would be improbable for the Clearfield State Bank to make the loan on property in Sanpete County, that if a loan were to be considered it would have to be complete documentation including knowledge of the status of the owner, (Tr. 51) in this case, Suburbia Land Company of either Idaho, Nevada or Utah, depending on the case. (Tr. 59) He further stated that Maxfield had only indicated that he was a stockholder in one of the companies, but he did not know the de-

tails of Mr. Maxfield's ownership, nor did he know the amount of stock outstanding, nor the status of the company, (Tr. 55) all of which he said would have been essential before making a loan. He further stated that any loan application had to be approved by the loan committee because it had never been submitted to the bank in a complete form. He further stated that upon cross-examination, had he known the facts which had been elicited in trial concerning the status of Suburbia Land Company, the status of Maxfield, and the other material items to the loan application which would have been required, the Clearfield Bank under no circumstances would have made the loan. (Tr. 55, 59) To contend to this court that there was a commitment is to mislead this court.

Referring to Mr. Romero's claim of personal assets, the thrift certificates referred to were the most dubious of evidence and were admitted through sheer tolerance of the court. The court recognized the objections to the admissibility of such photostats of certificates of trust issued by Interlake Thrift, noting that there was no proof that Interlake Thrift was a viable company, that the certificates had not been mortgaged, pledged or otherwise encumbered, or that Romero, in fact, could obtain money from the said certificates. (Tr. 364) The court also acknowledged that the best evidence of whether Romero could have gotten money out of those certificates would have been to call someone from Interlake Thrift Company to testify that those certificates were in good standing on the date of the alleged tender.

The appellants cap their conclusion in respect to Point II with this comment:

Such testimony by them [Bagnalls] is unsupported by anything other than their naked word.

This statement causes the respondents to believe that Bagnalls' naked word was like gold compared to the evidentiary lead offered by the appellants.

The Supreme Court of Utah in Hyams v. Bamberger, 10 Utah 3, 36 P. 202 (1894), said that to have the effect of a valid tender, the party making a tender "must have the ability to produce it, and must act in good faith." Although an old case, it is still good law. The weight of the evidence at trial in the instant case overwhelmingly demonstrated appellants inability to produce the delinquent amount after the Bagnalls had made repeated demands.

POINT III

RESPONDENTS NEVER REFUSED TO GIVE AN ACCOUNTING TO THE APPELLANTS, BUT EVEN IF THEY HAD, SUCH REFUSAL WOULD NOT CONSTITUTE A WAIVER OF PERFORMANCE.

It became obvious to the court and jury that in the entire series of tenders by Maxfield for Suburbia, Romero, or himself, he never noted for whom he was making a tender. That the tenders were in bad faith is a conclusion that is inescapable from the manner and conduct of the appellants.

The ranch on which Maxfield was living when the lawsuit was instituted is located less than five miles from Ephraim. The Bagnalls were living in California. At all times when the alleged tenders were made, Maxfield merely had to go to the Bank of Ephraim to determine the balance owing on the contract or to determine the delinquency owing on taxes, water assessments, and principal and interest payments. The bank kept a running account in its escrow ledger of the balance owing and could have calculated for Maxfield, Romero, or Suburbia the deficiencies at any given time. (Tr. 16, 17, 34, 95, 131, 132) Rather than avail himself

of the escrow agreement to which Suburbia was signatory, Maxfield chose to write the very vague proffers of performance.

The assertions of appellants that the respondents had refused payment of the delinquencies and had insisted on the payment of the entire amounts due and owing is contrary to the facts. Both of the Bagnalls testified on direct examination that prior to instituting suit they requested payment of the delinquencies only (Tr. 38, 151) and had, in fact, journeyed to the ranch in July of 1969, to make demand for those deficiencies and hoping to be paid those deficiencies. Instead, they were met by the responses of Maxfield that he was not going to pay them, that he had mortgaged the property, that it was totally encumbered, and that he did not have any money, (Tr. 38, 39, 165) but that the best he could do or would do was give them some cemetery lots (Tr. 38, 165) or some coupon books in a frozen food program. The appellants have refused to recognize or to so advise this court of these facts which were elicited repeatedly. Such testimony would be amply supported in the direct and cross-examination of Judge Tibbs and in the direct examination of Mr. and Mrs. Bagnall. But even if one were not to rely entirely upon the direct examination of Mr. Bagnall, it seems to these respondents that it is difficult for the appellants to escape Mrs. Bagnall's comment on cross-examination by Mr. Lord on page 150 and 151 of the transcript they did send up, to this effect:

Q. You didn't at any time along at that meeting (July 6 to 6, 1969), state that you did not want the property back?

A. No.

Q. You did not at any time state that you did want the property back.

A. We said at the end when we left him, well, if you won't pay us then there is nothing left for us to do but to sue.

Q. Excuse me, I thought you were through. Isn't it also a fact that you demanded the entire balance?

A. No.

Q. That you stated to him that he was to pay off the contract in full?

A. No. At that time we were asking for delinquencies.

The court should also be aware of the fact that Mr. Tibbs had been trying to get Maxfield to pay these deficiencies by telephone and letter prior to the date of the Bagnalls' visit to Mr. Maxfield. In fact, the Bagnalls journeyed out to see Mr. Maxfield to see if they could collect the delinquencies upon the advise of Mr. Tibbs. (Tr. 121)

Judge Tibbs, in his letter of July 9 (Defendants' Exhibit 16), refers to Maxfield's previous offers of partial payment. Judge Tibbs testified that Maxfield had suggested rewriting the contract and making payments substantially different than those to which he was obligated and that after the visit of the Bagnalls he wrote the letter of July 9, 1969. He further stated that the letter of July 9 was only intended as a demand that the delinquencies be paid, which was consistent with his previous oral communications with Maxfield. He testified that that letter did not contemplate payment of the entire balance due under the contract and that Maxfield knew, or should have known it, by reason of that letter and the previous oral communications between Tibbs and Maxfield. This is a further illustration of the appellants' efforts at distorting the facts.

The appellants, in summary, state "defendants could not make

a tender of money because they had no way of knowing the amount due." This type of commentary to this court in light of the record that has been offered is grossly misleading. Respondents cite no case law for Point III because the question of whether the amount of the buyers' delinquency was readily known to them is a fact question.

POINT IV

THE RESPONDENTS' NOTICE OF DEFAULT WAS EFFECTIVE.

The court, in the pretrial order, found that the respondents' notice of default was good. In addition, the court found that the notice served upon Reed R. Maxfield on July 31, 1970, was a notice stating that Suburbia Land Company was in default under the real estate agreement and modification agreement. The notice provided for thirty days in which to clear the default, otherwise the respondents would elect to terminate the agreements. The court further found (Finding of Fact 12) that the thirty-day notice provided for compliance and the notice of default and termination was reasonable under the circumstances. These were questions of fact. The notice as written and served satisfied the requirements of the contract and of the law.

POINT V

RESPONDENTS DID NOT ACCEPT PAYMENT AFTER THEIR EFFECTIVE NOTICE TO APPELLANTS ON MAY 25, 1970, AND, THEREFORE, THE CONTRACT WAS NEVER REINSTATED.

In accordance with the appellants usual candor, they have failed to mention that the simple \$400.00 payment was surretiously made to the Ephraim Bank in a deliberate effort to develop a waiver. The appellants knew litigation was pending and that the respondents had no intention of accepting any delinquent payments.

Furthermore, the payment made was totally inadequate under any sense of the word and was made for the purpose of creating a defense.

When the respondents were advised to the attempted payment, the matter was presented to the court at a time when Judge Erickson was the judge. Judge Erickson ordered the payment held by the bank in a special account subject to the completion of the litigation. The appellants did not designate Judge Erickson's order as part of the record. On Exhibit 11, the records of the Bank of Ephraim show this notation in respect to its receipt of the \$400.00:

Not accepted. Court order by Judge Erickson to place in special fund.

When arguing the matter to Judge Erickson, it became apparent to the appellants that Judge Erickson did not favor their theory of the case, consequently, they filed an affidavit of prejudice against him, thereby getting a new judge. The circumstances surrounding payment of this \$400.00 have become obscured in the legal folderol that has taken place in respect to the entire case.

If the \$400.00 payment had been made simply as a delinquent payment and had been accepted, there may have been some truth to the appellants' position, however, appellants know that the representations made under Point V are contrary to the fact and are totally refuted by the evidence.

POINT VI

THE SINCERITY OF APPELLANTS' OFFER TO PAY THE ENTIRE CONTRACT BALANCE WOULD HAVE BEEN BEST DEMONSTRATED UNDER RULE 67, U.R.C.P., THEREFORE, THEIR OFFER TO PAY THE SAME TO THE COURT SHOULD BE DISREGARDED.

Point VI is similar to Point V in as much as appellants attempt to lift themselves by their own bootstraps since appellants fail to support their allegations concerning a proffer in Judge Erickson's court with any transcript of the record. The best we have is appellants' blatant assertion that Judge Erickson refused to allow the proffer of appellants to be heard on the motion to accept the proffer of proof. No one knows whether the appellants had sufficient money to make a tender. There certainly exists no evidence of ability to make a valid tender in the record of the court.

The truth seems inconsistent with appellants' argument for if the appellants had wanted to make payment in the court, they could have done so pursuant to Rule 67 of the Utah Rules of Civil Procedure. Nothing would have prevented the appellants from paying any amount of money into court. The appellants' position is always the same. They want to make their tender without showing any ability to perform. The sincerity of the appellants would have been best demonstrated by a tender into court of spendable money.

POINT VII

THE FAILURE OF RESPONDENTS TO AMEND THE PRETRIAL ORDER WAS NOT REVERSIBLE ERROR.

Appellants argue that the pretrial order and findings of the court are "mutually contradictory" and that the "plaintiff should have been required to amend the pretrial order."

It is true that the Utah Rules of Civil Procedure, Rule 16, contemplate that a pretrial order may be amended under the proper circumstances to "prevent manifest injustice." The instant case, however, does not require any such amendment of the pretrial

order to prevent "manifest injustice." The failure of plaintiffs to so amend was not reversible error.

Any contradiction between the pretrial order and findings of the court is not reversible error because the only purpose of a pretrial order is to control "the subsequent course of the action" and, therefore, a pretrial order is not dispositive of the case. The pretrial order is not so important so as to displace the decision-making province of a court. Any contradictions between a pretrial order and the court's ultimate decision do not constitute reversible error.

POINT VIII

IT WAS NOT ERROR FOR THE COURT TO BE SELECTIVE IN ITS ACCEPTANCE OF PORTIONS OF THE JURY VERDICT AND REJECTION OF OTHER PORTIONS.

Appellants argue that the court must either accept or reject the findings of the advisory jury in their entirety; that it was improper for the court to "pick and choose." Respondents answer that it is elementary that the function of an advisory jury is only advisory.

Utah Rules of Civil Procedure, Rule 39(c) provide for an advisory jury. Professor Moore has interpreted the use of an advisory jury under Federal Rule 39(c), which is similar to the Utah Rule, as merely an aid to the judge since the judge still must make his own Findings of Fact and Conclusions of Law and must bear the ultimate responsibility for the judgment. See 5 Moore's Federal Practice, §39.10(1). It was not reversible error for the court to be selective in its acceptance of the jury's findings.

Furthermore, the court only rejected the answer to interro-

gatory No. 12 out of 16 interrogatories submitted to the jury. It was obvious that the jury misunderstood the question because it was negatively phrased for this was the only interrogatory that was answered in the appellants favor. When considered with the jury's other answers it is patently clear that if it had not been for the reverse phraseology this question too would have been answered in favor of the respondents.

POINT IX

THE ENTIRE TRANSCRIPT AMPLY SUPPORTS THE CREDIBILITY OF THE BAGNALLS.

In response to appellants' Point IX, in which appellants argue that the testimony of the Bagnalls was contradictory, respondents answer that any question as to credibility of the Bagnalls could only be determined by an appellate court on the basis of the entire record. Even if there exists some minor, inconsequential contradiction in respondents' testimony, still the overwhelming bulk of the evidence clearly supports the credibility of the Bagnalls.

POINT X

RESPONDENTS ARE ENTITLED TO HAVE THE JUDGMENT AFFIRMED BASED UPON THE STATUS OF THE RECORD ON APPEAL.

The appellants chose to selectively designate only those portions of the trial transcript and exhibits which were favorable to their position on appeal. The record of the appellants on appeal covers only the following portions of the trial transcript:

- (a) Testimony of Lynn Nielson.
- (b) Rebuttal Testimony of J.R. Bagnall on the afternoon of April 29, 1974.
- (c) All cross and re-cross examinations of Joseph R. Bagnall

beginning April 24, 1974.

- (d) All testimony of Edgar R. Anderson.
- (e) Cross examination of Don V. Tibbs.
- (f) Direct testimony of Reed R. Maxfield.
- (h) Direct examination of Lester R. Romero by defendants'

attorney, Robert L. Lord.

- (i) All cross examination of Florence Bagnall.
- (j) Direct examination of Bruce Watkins.

Appellants omitted the following testimony:

- (a) Direct examination of J.R. Bagnall.
- (b) Re-direct examination of J.R. Bagnall.
- (c) Direct examination of Don V. Tibbs.
- (d) Cross examination of Jackson Wanlass.
- (e) All cross examination of Reed R. Maxfield. (Note:

Respondent called Mr. Maxfield as an adverse witness).

- (f) Cross, re-direct, and re-cross of Lester R. Romero.
- (g) All direct and re-direct of Florence Bagnall.
- (h) Cross, re-direct, re-cross, further re-direct of

Bruce Watkins.

- (i) All testimony of Mildred S. Maxfield.
- (j) All testimony of Lavera Maxfield.
- (k) All testimony of Leland Peterson.
- (l) All testimony of John Brown.
- (m) All testimony of Edgar Anderson.
- (n) All testimony of Lynn Nielson.
- (o) All testimony of Robert Lord.

Appellants designated only the following exhibits:

- (1) Plaintiffs' exhibits 3-7, 10, 11, 14-18, 27, 29-32, 34,

36 and 40.

(2) Defendants' exhibits 12-20, 22, 25, 26, 32-35, 46 and 47.

Appellants elected to omit the following exhibits:

(1) Plaintiffs' exhibits 1, 2, 8, 9, 12, 13, 19-26, 28, 33, 35, 37-39 and 41-58.

(2) Defendants' exhibits 21, 23, 24, 27-31, 36-45, 48 and 49.

(There were no defendants' exhibits 1-11).

It should be noted that plaintiffs' exhibit 9 was a schedule of payments showing the delinquent amounts owed by the appellants. Plaintiffs' exhibit 12 was a summary of the escrow account showing what had been deposited by the appellants.

Respondent refers the Court to pages 672, 676-680 of the record which is a record of the witnesses called and the exhibits introduced at trial. A cursory examination of the exhibits omitted by appellants, as outlined above, will show that other relevant exhibits were not designated by the appellants.

Appellants' burden on appeal is to show that the findings and conclusions of the trial court are in error. Latimer v. Katz, 29 U.2d 280, 508 P.2d 542 (1973), Ewell & Son, Inc. v. Salt Lake City Corporation, 27 U.2d 188, 493 P.2d 1283 (1972). This is true because the actions of the trial court are clothed with a presumption of validity, and the appellant must show such serious inequity as to manifest a clear abuse of discretion. Searle v. Searle, 522 P.2d 697 (Utah, 1974). The appellate court will reverse the decision of the trial court only if the evidence clearly preponderates against the trial court's findings and judgment. Del Porto v. Nicolo, 27 U.2d 286, 495 P.2d 811 (1972), and First Western Fidelity v. Gibbons & Reed Company, 27

U.2d 1, 492 P.2d 132 (1971).

To sustain the burden of showing that the trial court's decision was in error, appellants are required to bring all the evidence relating to the issues on appeal before the court, in order to allow the court to determine the weight and validity of the evidence presented at the trial. The appellate court requires all of the record in order to knowingly decide the issues. This rule is lucidly stated in Buchanan v. Crites, 106 Utah 423, 150 P.2d 100 (1944):

"On appeal the appellant has the burden of showing wherein the trial court erred. If the record is not sufficient to determine a material question because of the fact that the appellant has failed to bring enough of it before us, the doubts should be resolved in favor of sustaining the judgment." Id. at 101.

This rule has been reaffirmed in James Manufacturing Company v. Wilson, 15 U.2d 210, 390 P.2d 127 (1964), a case whose facts are very similar to this case. In James the appellant was contesting the sufficiency of the evidence which supported the trial court's judgment. The appellant had not designated all of the trial record on appeal. The Utah Supreme Court ruled that:

". . . plaintiff saw fit to include only a portion of the testimony in the record upon this appeal. Under the circumstances it is impossible for this court to properly assess the entire evidence and determine whether the trial court was correct in denying these motions of the plaintiff. It must, therefore, be presumed that the rulings were supported by the evidence produced at the trial." Id. at 129.

See also Owyhee, Inc. v. Robbins Marco Polo, 17 U.2d 181, 407 P.2d 565 (1965), Bennett Leasing Company v. Ellison, 15 U.2d 72, 387 P.2d 246 (1963), Walker Bank & Trust Company v. Neilson,

26 U.2d 383, 490 P.2d 328 (1971) and Watkins v. Simonds, 14 U.2d 406, 385 P.2d 154 (1963).

The Supreme Court has thus repeatedly stated that failure to designate all of the pertinent record will result in a presumption that the evidence at trial was sufficient to support the verdict.

These opinions are in line with reason and the decisions of courts in other jurisdictions.

"If the evidence is not in the record, the presumption is that it was sufficient to sustain the judgment, and that it supported all findings of fact and all facts pleaded and essential to the judgment. If only part of the evidence is in the record, the presumption is that the omitted evidence supports the judgment, and that is sufficient to cure any defects in the evidence brought up." 4 Am.Jr.2d, Appeal and Error, §526.

The Federal Rules of Appellate Procedure now require that the entire transcript be sent by the clerk of the court to the appellate court unless the parties stipulate to omit unnecessary evidence. F.R.A.P. 10(a). Appellants in the federal courts have the responsibility . . .

". . . to insure that the record contains everything that is necessary for the determination of the issues presented by the appeal" 9 Moore's Federal Practice, ¶210.03.

These federal courts realized long ago that the entire record pertaining to the issues was necessary in order to evaluate the claims of the appellant. To proceed otherwise would result in conjecture and injustice. This problem has been recognized in the federal courts and by the Utah Supreme Court for many years, and the problem has been remedied by requiring the designation of

all the trial record relevant to the appeal.

Appellants in this case have omitted almost all of the evidence favorable to the respondent relating to the issues on appeal. Appellants for the most part have included only the direct testimony of their witnesses and the cross-examination of adverse witnesses. This is an obvious attempt to slant the weight and credibility of the evidence at trial. It is just this sort of abuse that the Utah Supreme Court has attempted to eliminate by the rulings cited above.

This objection is particularly relevant to Point IX of appellants' brief. In this point appellants allege that a reading of the entire transcript reveals that the plaintiffs' testimony is contradictory. Appellant is required to produce the entire transcript in order for this Court to analyze this claim. If this record is not included, this Court should affirm the judgment of the trial court.

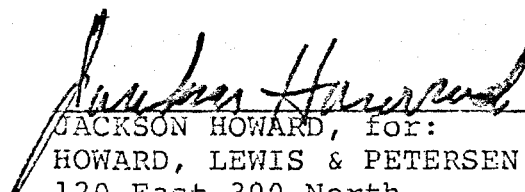
Appellants' designated record is insufficient to allow this Court to knowledgeably analyze the findings and judgment of the trial court. Appellants have failed to meet their burden of proof on appeal because the Court must presume that the trial court's findings and judgment were supported by the omitted evidence. Appellants' failure to designate all of the trial record pertaining to the issues on appeal is fatal to their argument and the appeal should be dismissed.

CONCLUSION

Respondents conclude that the judgment in favor of the respondents and against the appellants forfeiting the real estate agreement and quieting title in the respondents, except for an

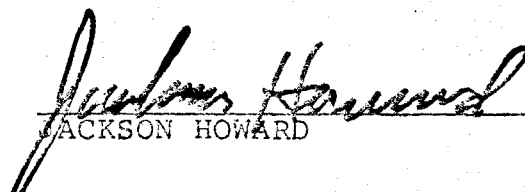
undivided 1/2 interest in 140.15 acres, should be affirmed.

Respectfully submitted,


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MAILING AFFIDAVIT

I, Jackson Howard, Attorney for Plaintiffs and Respondents,
hereby certify that I mailed two copies of the foregoing Brief to
Robert L. Lord, Attorney for Defendants and Appellants, 118
Metro Building, 431 South 300 East, Salt Lake City, Utah 84111,
this 3rd day of June, 1975.


JACKSON HOWARD